

Endangered Species Committee Newsletter

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BUSH ADMINISTRATION FINALIZES REVISIONS TO ESA SECTION 7 CONSULTATION REGULATIONS; CONGRESS AND OBAMA ADMINISTRATION RESPOND

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On Dec. 16, 2008, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) finalized significant revisions to the Endangered Species Act (ESA) consultation regulations. *See* Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76,272 (Dec. 16, 2008). The revised regulations, effective on Jan. 15, 2009, are already the subject of three separate lawsuits. More importantly, Congress and the Obama administration have responded to the revised regulation.

On March 3, 2009, President Obama issued a memorandum to the heads of executive departments and agencies that (1) directs the Departments of the Interior and Commerce to review the revised regulations to determine whether to undertake new rulemaking procedures regarding consultation and (2) requests that heads of all agencies “exercise their discretion, under the new regulation, to follow the longstanding consultation and concurrence practices involving the FWS and NMFS.” *Available at* http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/. In the Omnibus Appropriations Act, 2009, approved by the U.S. House of Representatives on Feb. 25, 2009, and by the U.S. Senate on March 10,

2009, Congress authorized the Secretaries of the Interior and Commerce to, within 60 days, withdraw the final rule revising the consultation regulations (as well as the Section 4(d) special rule regarding the polar bear listing) without regard to any provision of statute or regulation that establishes a requirement for such withdrawal, and to implement the prior consultation regulations. *See* Omnibus Appropriations Act, 2009, H.R. 1105, § 429. In light of these actions, it is unlikely that the revised regulations will be implemented. Nonetheless, the remainder of this article describes the revised Section 7 regulations that are currently under review.

ESA Section 7 requires that each federal agency (the “action agency”) consult with the Service to ensure that any action authorized, funded, or carried out by such agency—such as the issuance of a right-of-way by the Bureau of Land Management or the Army Corps of Engineers’ issuance of a Section 404 dredge and fill permit—is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of any critical habitat of such species. 16 U.S.C. § 1536(a)(2). This consultation can be formal or informal. Informal consultation is a voluntary process consisting of discussions between the Service and the action agency designed to determine whether the effects of the action on listed species and critical habitat require formal consultation. Formal consultation, if required, results in the Service’s issuance of a biological opinion, which concludes whether the proposed action would result in jeopardy to listed species or in the destruction or adverse modification of critical habitat.

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The final rule makes significant revisions to three components of the consultation regulations: (1) the action agency’s determination of the need to consult, (2) the scope of the effects of the action, and (3) timeframes for informal consultation. All three of these components have been challenged in the complaints filed seeking to enjoin the final rule.

Determination of the Need to Consult

The final rule will allow action agencies in certain circumstances to determine the effects of their actions on listed species and critical habitat without concurrence from the Service. Under the previous regulations, promulgated in 1986, an action agency could satisfy its Section 7 obligations without concurrence from the Service only if the action agency determined that the proposed action would have no effect on listed species or critical habitat. 50 C.F.R. § 402.14(a) (2008). If the action agency concluded that the action may affect, but was not likely to adversely affect listed species or critical habitat, it had to obtain the written concurrence of the Service through informal consultation. *Id.* § 402.14(b). For any other “may effect” determination, formal consultation was required. *Id.* § 402.14(a).

The final rule retains the ability of the action agency to unilaterally make a “no effect” determination. 73 Fed. Reg. at 76,287 (codified at 50 C.F.R. § 402.03 (b)(1)). But it also permits an action agency to satisfy its Section 7 consultation obligations without concurrence from the Service when that agency concludes that a proposed action is not anticipated to result in take of a listed species and:

- The effects of such action are manifested through global processes and
 - (i) cannot be reliably predicted or measured at the scale of a listed species’ current range, or
 - (ii) would result at most in an extremely small, insignificant impact on a listed species or critical habitat, or
 - (iii) are such that the potential risk of harm to a listed species or critical habitat is remote;
- The effects of such action on a listed species or critical habitat are not capable of being measured or detected in a manner that permits meaningful evaluation; or

- The effects of such action on a listed species or critical habitat are wholly beneficial.

Id. (codified at 50 C.F.R. § 402.03(b)(2), (3)).

For actions that have some effects exceeding such parameters, only those effects not falling within Section 402.03(b)(2) and (3) need be considered during consultation. *Id.* (codified at 50 C.F.R. § 402.03(c)). The Services also retain their ability to request that the action agency enter into formal consultation. 50 C.F.R. § 402.14(a).

The reference to “global processes” is intended to ensure that a proposed action’s contributions to greenhouse gas (GHG) emissions do not trigger the need for, and are not considered during, consultation. For instance, under the revised regulations, a federal agency authorizing a coal-fired power plant in Georgia would not have to consult with the Service on the effects of the project’s GHG emissions on polar bears because, at this time, there does not appear to be a way to predict or measure the impacts on the polar bear resulting from the plant’s contributions to global climate change. This revision is consistent with the recent Solicitor of the Interior’s opinion that concludes that “where the effect at issue is climate change in the form of increased temperatures, a proposed action that will involve the emission of GHG cannot pass the ‘may affect’ test and is not subject to consultation under the ESA and its implementing regulations.” *See* Guidance on the Applicability of the Endangered Species Act’s Consultation Requirements to Proposed Actions Involving the Emissions of Greenhouse Gases, M-37107, Solicitor of the Interior (Oct. 3, 2008), available at <http://www.doi.gov/solicitor/opinions/M-37017.pdf>.

Scope of the Effects of the Action

The final rule revises the definition of “effects of the action” by adding a definition for “direct effects,” modifying the existing definition of “indirect effects,” and adding a definition of “reasonably certain to occur.” *Id.* at 76,287 (codified at 50 C.F.R. § 402.02). The purpose of these revisions is “to capture the appropriate practice of the Services to require a close causal connection” between a federal

agency action and an effect on the species. *Id.* at 76,277.

The revised regulation states that “[d]irect effects are the immediate effects of the action and are not dependent on the occurrence of any intervening actions for the impacts to species or critical habitat to occur.” *Id.* at 76,287. Indirect effects are defined as “those for which the proposed action is an essential cause, and that are later in time, but still are reasonably certain to occur. If an effect will occur whether or not the action takes place, the action is not an essential cause of the indirect effect.” *Id.* Finally, the revised regulation states that “reasonably certain to occur” is “the standard used to determine the requisite confidence that an effect will happen”, which must be based on clear and substantial information.” *Id.* The Services explain, in the preamble, that “reasonably certain to occur” is a stricter standard than “reasonably foreseeable.” *Id.* at 76,278.

Timeframes for Informal Consultation

Under the 1986 regulations, informal consultation had no time limits, but generally terminated upon the Service’s concurrence with an action agency’s “not likely to adversely affect” determination or upon initiation of formal consultation. 50 C.F.R. § 402.13 (2008). The final rule provides that if the Service has not provided a written statement as to whether it concurs with an action agency’s determination that a proposed action is not likely to adversely affect listed species or critical habitat within 60 days of the request for concurrence, the action agency may terminate consultation. 73 Fed. Reg. at 76,287 (codified at 402.13(b)). The Service may, however, extend the 60-day period for up to an additional 60 days upon written notice to the action agency within the initial 60-day period. *Id.* If the action agency terminates consultation at the end of the 60-day period, or if the Service’s extension period expires without a response, the action agency has satisfied its consultation obligations. *Id.*

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FEDERAL CIRCUIT HOLDS GOVERNMENT POTENTIALLY LIABLE FOR WATER LOST DUE TO NEEDS OF MIGRATING FISH

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Since its enactment in 1973, the federal Endangered Species Act (ESA) has been applied to regulate, limit, or outright prohibit a host of economic activities that have contributed to the decline of listed species, including activities involving land management and development, construction of infrastructure, and the delivery and management of water. Under the ESA's mandate, those limits must be imposed "at whatever the cost." *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). To date, most of those costs have been borne by landowners, water rights holders, or state and federal agencies undertaking public projects or other programs subject to the ESA. Now, at least with regards to water rights, the burden of those costs could be shifting to the federal government. In the most recent takings case to address the ESA and the regulation of water, *Casitas Municipal Water District v. United States*, the United States Court of Appeals for the Federal Circuit ruled on Sept. 25, 2008 that by requiring the Casitas Municipal Water District (Casitas) to divert water to support fish passage, the federal government took "physical possession of the water." Consequently, the court held, the lower court must apply the "per se" rules governing "physical takings," and not the "multi-factor balancing test" that commonly governs "regulatory takings," to determine whether compensation is due under the Fifth Amendment to the U.S. Constitution.

In 1956 Congress authorized the Ventura River Project, which the U.S. Bureau of Reclamation (Bureau) owns and which supplies water from the Ventura River and Coyote Creek for municipal, industrial, and irrigation uses in Ventura County, California. The project comprises the Casitas dam and reservoir, Robles diversion dam, Robles-Casitas canal, and other related facilities, and it is operated and maintained by Casitas under a repayment contract entered with the Bureau when the project was first authorized. Casitas holds the right to divert and store

up to 107,800 acre-feet per year and to put up to 28,500 acre-feet per year to beneficial use through a license issued by the California State Water Resources Control Board.

The controversy under the ESA first emerged in 1997 when the National Marine Fisheries Service (NMFS) listed the southern California steelhead (*Oncorhynchus mykiss*) as endangered. Shortly after the listing, California Trout, Inc. issued a 60-day notice of its intent to sue the Bureau and Casitas for unlawful "take" of California steelhead under the ESA's citizen suit provisions. Under Section 9 of the ESA, "it is unlawful for any person" to "take" endangered species. 16 U.S.C. § 1538(a)(1). Casitas and the Bureau thereafter sought to construct the Robles Diversion Fish Passage Facility and obtain incidental take authority under Section 7 of the ESA.

Under Section 7, federal agencies must consult with the U.S. Fish & Wildlife Service (FWS) or NMFS on any proposed federal action—in this case, the construction and operation of the Robles Diversion Fish Passage Facility—that "may affect" a listed species or result in the "destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.03, 402.14(a), 402.14(g)(4). If FWS or NMFS finds that the action may jeopardize the species or adversely modify critical habitat, the agency must propose "reasonable and prudent alternatives" that can be taken by the agency to avoid jeopardizing the species. 16 U.S.C. § 1536(b)(3)(A). If, on the other hand, FWS or NMFS concludes that the action will not result in jeopardy or adverse modification of critical habitat, FWS or NMFS may issue a biological opinion and incidental take statement specifying "the amount or extent" of take allowable, "reasonable and prudent measures" considered "necessary or appropriate" to minimize the impact of the action, and any "terms and conditions . . . that must be complied with by the Federal agency or any applicant." 50 C.F.R. § 402.14(i)(1); *see also* 16 U.S.C. § 1536(b)(4). But these measures and conditions "cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes." 50 C.F.R. § 402.14(i)(2).

Here, in response to the notice of intent to sue, in 1999 the Bureau initiated formal Section 7 consultation with NMFS on the Robles Diversion Fish Passage Facility. NMFS issued its biological opinion on March 31, 2003, which concluded that the facility would not jeopardize southern California steelhead. The opinion nonetheless included reasonable and prudent measures requiring the Bureau and Casitas to minimize the project's construction period and to monitor and modify certain operations. It also called on the Bureau to adopt new operating criteria to augment flows for fish survival—operating criteria that placed restrictions on Casitas' water diversions and, according to Casitas, would have required Casitas to “permanently forgo” about 3,200 acre-feet of its water right.

Perhaps buoyed by the proceedings in another recent takings case, Casitas filed suit in the Court of Federal Claims alleging damages from the federal government for breach of contract and for a taking under the Fifth Amendment to the Constitution. The Court of Claims in the previous case —*Tulare Lake Basin Water Storage District v. United States*—awarded several state water contractors \$26 million for their loss of water resulting from ESA restrictions placed on the State Water Project. Despite having previously ruled in favor of the water contractors in the *Tulare Lake* case, however, Judge Wiese denied both claims. In denying the takings claim, Judge Wiese distinguished between a physical taking—which involves a “government takeover of property”—and a regulatory taking—which is derived from “government restraints on an owner's use of that property.” Because limits on Casitas' diversions did not amount to a “redirection of a property's use,” Judge Wiese held that it did not amount to a physical taking.

On appeal, the Federal Circuit disagreed, and found that the government's exercise of control over the water amounted to a “physical appropriation,” which is properly evaluated according to the “per se” rules applied to physical takings. *Casitas Municipal Water District v. United States*, 543 F.3d 1276, 1292-1296 (Fed. Cir. 2008). The Federal Circuit reached its decision based on two key, salient facts. First, the federal government admitted for purposes of summary judgment that “operation of the fish ladder required water.” Second, the federal government admitted that

the water “would have gone into the Casitas Reservoir” for use by Casitas. According to the court, “[t]hese admissions make clear that the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal—after the water had left the Ventura River and was in the Robles-Casitas Canal—and towards the fish ladder, thus reducing Casitas' water supply.” This amounted to the “active hand” of government, taking “physical possession of the water” for a public purpose—providing flows for endangered fish. Thus, the Federal Circuit reversed the trial court's grant of summary judgment, and remanded the case for consideration under the “physical taking” and not the “regulatory taking” jurisprudence. The appeals court left open the question of whether a taking actually occurred in this instance, and whether compensation is due from the federal government.

Petitions for re-hearing and for hearing en banc were filed by the State of California and others in December 2008. Whether or not the Federal Circuit's decision stands, the conflicts between water rights and endangered species will undoubtedly intensify, and these cases will provide a glimpse at how water fits within the Constitutional principles governing regulatory and physical takings. In the meantime, government regulators will need to find alternative ways to implement the ESA's inflexible mandate or face additional diversions from the public fisc to pay for species protection.

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**NATIONAL MARINE FISHERIES SERVICE
ISSUES UNPRECEDENTED BIOLOGICAL
OPINION FOR PUGET SOUND REGION
FLOOD INSURANCE PROGRAM**

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On Sept. 22, 2008 the National Marine Fisheries Service (NMFS) issued an unprecedented Biological Opinion and Incidental Take Statement for the National Flood Insurance Program in the Puget Sound Region (the “Puget Sound NFIP”). The Biological Opinion is a first because until recently, the Federal Emergency Management Agency (FEMA) administered the NFIP to reduce federal expenditures for flood losses and disaster assistance by providing flood insurance at reasonable rates, and by constricting development in flood-prone areas and guiding future development away from such areas. FEMA did not see its statutory mandate as encompassing the protection of threatened or endangered species. However, in *National Wildlife Federation v. FEMA* (discussed below), the U.S. District Court for the Western District of Washington held that FEMA’s administration of the Puget Sound NFIP may affect listed species or adversely modify critical habitat in the Puget Sound area; therefore, FEMA has a duty to consult with NMFS to insure that the Puget Sound NFIP does not jeopardize the continued existence of threatened or endangered species or adversely modify their critical habitat.

In the Biological Opinion, NFMS determined that FEMA’s business-as-usual administration of the Puget Sound NFIP—which allowed land owners and local jurisdictions to remove land from the 100-year floodplain by placing fill or constructing levees, berms, or floodwalls—is likely to jeopardize the continued existence of federally threatened or endangered salmon, steelhead, and killer whales, and is likely to result in adverse modification or destruction of designated critical habitat. Pursuant to the Endangered Species Act (ESA) and its implementing regulations, NMFS included a Reasonable and Prudent Alternative (the “NFIP RPA”) and Incidental Take Statement with the Biological Opinion. As detailed below, the NFIP RPA will have the effect of drastically curtailing

development in the 100-year floodplain in the 270 Puget Sound communities that enroll in the NFIP. But as the first of its kind, it also provides insight into how the wildlife services may exert their newfound influence over FEMA’s administration of the NFIP nationwide.

The National Flood Insurance Program

Under the National Flood Insurance Act of 1968 (46 U.S.C. §§ 4001 et seq., as amended) (NFIA), FEMA is required to implement a national flood insurance program that makes flood insurance available to “interested persons” in communities that adopt regulations or ordinances that meet certain minimum floodplain management criteria (“minimum criteria”) promulgated by the director of FEMA. The administration of the NFIP has three discretionary components: (1) the floodplain mapping program, in which FEMA determines where the floodways and floodplains are located, and which forms the basis for the Flood Insurance Rate Map (FIRM) for flood-prone communities, (2) the minimum criteria for community enrollment in the NFIP, and (3) the Community Rating System (CRS), which offers lower flood insurance premiums to communities that adopt floodplain management measures specified in the CRS that exceed the minimum criteria. If a community adopts enforceable land use measures that meet or exceed the minimum criteria for floodplain management, FEMA must allow the community to enroll in the NFIP and offer flood insurance within the community.

The NFIA does not require communities to enroll in the NFIP. Instead, it uses the power of the purse to encourage state and local governments to adopt measures that meet or exceed the NFIP’s minimum criteria, thus enabling owners of property in the floodplain to purchase federal flood insurance. The encouragement is undeniably powerful. For instance, the NFIA prohibits federally regulated lenders and federal agencies from providing loans or other financial assistance for acquisition or development within the 100-year floodplain of non-participating communities. Also, communities that do not participate in the NFIP are not eligible for certain types of federal flood disaster relief.

The National Wildlife Federation Litigation

FEMA undertook formal consultation with NMFS pursuant to an order issued in *National Wildlife Federation v. FEMA*, 345 F. Supp. 2d 1151 (W.D. Wash. 2004) (*NWF v. FEMA*). There, the court held that FEMA violated the ESA by not consulting with NMFS regarding the Puget Sound NFIP's impacts to threatened Puget Sound chinook salmon. Specifically, the court determined that FEMA should have undertaken Section 7 consultation with NMFS with respect to the mapping, setting of minimum criteria, and design of the CRS, since those aspects of the NFIP are discretionary actions; but that it need not consult with respect to the impacts resulting from the actual sale of flood insurance, since FEMA has no discretion not to offer flood insurance to interested persons in communities that meet the minimum criteria and request coverage.

In its cross-motion for summary judgment, FEMA argued that it was not required to consult for two independent reasons. First, it argued that the NFIP is not a discretionary agency action for purposes of the ESA because the NFIA does not authorize FEMA to tailor the NFIP for the benefit of listed species. It mandates that FEMA administer the NFIP to minimize and insure against flood losses. Second, FEMA argued that implementation of the NFIP did not meet the "may affect" trigger for Section 7 consultation because FEMA does not administer the local floodplain management measures or authorize development in flood-prone areas; that is the responsibility of the communities that voluntarily enroll in the NFIP.

The district court rejected both arguments. It determined that FEMA's promulgation of mapping and map revision standards, minimum eligibility criteria, and CRS standards are all "discretionary actions" for purposes of ESA Section 7 because the NFIA and FEMA's own regulations allow FEMA the discretion to tailor the NFIP to benefit listed species. It also rejected the argument that local regulations, not the NFIP, are the legally relevant causes of any impacts. The court held that the NFIP had "reasonably foreseeable" indirect effects on listed species and critical habitat because it encouraged development in the floodplain by allowing state and local governments as well as

private property owners to remove land from the mapped floodplain by placing fill or constructing levees and other flood protection measures, thereby avoiding the need to purchase flood insurance.

After the district court issued its ruling, FEMA performed a Biological Evaluation of the NFIP's impacts on listed species and critical habitat in the Puget Sound area and concluded that there would be no jeopardy and no destruction or adverse modification of critical habitat. But NMFS reached the opposite conclusion, finding that FEMA's proposed NFIP would jeopardize the continued existence of several federally listed salmon, steelhead, and the Southern Resident killer whale, and it would adversely modify critical habitat for salmon and the killer whale.

The Puget Sound NFIP Reasonable and Prudent Alternative

Because of its jeopardy and adverse modification findings, NMFS included a seven-part NFIP RPA, which FEMA must implement to receive incidental take authorization. The NFIP RPA includes minimum criteria such as a general prohibition on development in the Riparian Buffer Zone (RBZ) to either side of any floodway, ultra-low-density zoning in the 100-year floodplain, and a categorical prohibition on any new "stream crossings." In so doing, the NFIP RPA virtually eliminates the ability of communities and landowners to use the placement of fill or construction of levees to remove the filled area or land behind the levees from the Flood Insurance Rate Map (FIRM).

One of the minimum criteria restricts development in the RBZ by requiring local land use authorities to adopt an overlay zone that encompasses the greater of (1) all land within 150 feet from the ordinary high water mark for Type S (Shorelines of the State) and F (fish-bearing) streams; 100 feet for Type N (non-salmonid-bearing) streams; (2) the Channel Migration Zone plus 50 feet; and (3) the mapped floodway. Development in the RBZ is prohibited for the most part, unless it is "shown not to adversely affect water quality, water quantity, flood volumes, flood velocities, spawning, substrate, and/or floodplain refugia for listed salmon . . ." In practice, few projects will clear such a high bar.

For development in the 100-year floodplain that lies *outside* the RBZ, the NFIP RPA requires that communities either prohibit all development, or that they require compensation for any impacts on floodwater storage and fish habitat function. Further, any development in the 100-year floodplain must implement Low Impact Development (LID) techniques to manage storm water, structures on buildable lots partially inside the floodplain must be located on the portion of the lot outside the floodplain, the floodplain must be zoned for lots no smaller than 5 acres, and any such development must be designed so as not to require levees or other new structural flood protection.

The NFIP RPA allows that fill may be used to remove land from the mapped floodplain, but only if it can be shown that the impacts of the fill are fully offset elsewhere. This may be infeasible in many areas. Remarkably, communities must prohibit any new road crossings over any “stream” in the Puget Sound area. They must also change the way they manage their levees. Instead of clearing vegetation from levees—often to comply with U.S. Army Corps of Engineers (Army Corps) levee maintenance standards—they must adopt measures that would allow riparian vegetation and trees to grow on levee faces to provide sources of shade and large woody debris that benefit the salmon and steelhead. As a result, FEMA is consulting with the Army Corps to determine how best to proceed.

The NFIP RPA also required FEMA to notify enrolled communities that their current flood ordinances are causing “harm” to listed species and destruction or adverse modification of designated critical habitat. The notice cautions that participating communities must either adopt new floodplain management ordinances that comply with the NFIP RPA—including a recommended temporary moratorium on all development within the 100-year floodplain—or else risk violating the ESA’s take prohibition. Conversely, each community that adopts floodplain management ordinances in keeping with the minimum criteria in the NFIP RPA would receive take authorization under the Incidental Take Statement for the Puget Sound NFIP.

The Puget Sound NFIP RPA May Presage a Radical Shift in FEMA’s Implementation of the NFIP Nationwide

The significance of the NFIP RPA can hardly be overstated. The NFIP RPA will undoubtedly redirect development away from streams, rivers, and low-lying coastal areas throughout the approximately 10 million-acre Puget Sound region because few communities can afford to forgo the financial benefits of national flood insurance. Even if a community decides not to enroll in the Puget Sound NFIP, planners and developers are on notice that if they fail to comply with the minimum requirements in the NFIP RPA, they risk liability under the ESA.

The NFIP RPA could have repercussions well beyond the Puget Sound. The holdings in both *NWF v. FEMA* and the more recent in *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) can be used to argue that FEMA must undertake Section 7 consultation anywhere that flood-prone lands are designated critical habitat, and anywhere that development in flood-prone areas may affect listed species. Coastal wetlands and estuaries, as well as side channel habitat, fresh water wetlands, and riparian habitat within the 100-year floodplain are often essential for the survival of sensitive species. As a result, this first-of-its-kind NFIP RPA could also serve as a template for RPAs not only wherever salmon and steelhead are found in the Pacific Northwest, but throughout the vast Mississippi watershed, the Florida Everglades, the Chesapeake Bay, Hudson River Valley, and Great Lakes region, to name but a few. Thus, the Puget Sound NFIP RPA may well transform land use in and adjacent to 100-year floodplains across the country.

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JUDGE WANGER UPHOLDS NMFS STEELHEAD HATCHERY LISTING DECISIONS

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On Oct. 27, 2008, United States District Court Judge Oliver Wanger of the Eastern District of California issued his latest in a series of decisions leading to significant changes in how the state and federal governments manage California's water and biological resources, in the consolidated proceedings of *California State Grange v. NMFS* (06-308) and *Modesto Irrigation District v. Gutierrez* (06-453) (together, *Grange & MID II*). Judge Wanger previously invalidated biological opinions by the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS, together "Services") that had concluded that existing and planned Sacramento-San Joaquin Delta (Delta) water damming and diversion projects would not jeopardize Delta smelt and salmonids or their habitat listed under the Endangered Species Act (ESA). In *Grange & MID II*, Judge Wanger upheld the Services' decisions on assessing and listing the hatchery and naturally-spawning components of a species of Pacific Coast trout, *Oncorhynchus [O.] mykiss*. Their decisions will now be part of "recovery plans," "reasonable and prudent alternatives" (RPAs), and any Habitat Conservation Plan (HCP) developed for the Delta under Sections 4(f), 7(b), and 10 of the ESA.

The ESA is intended to conserve listed "species" and their ecosystems. The ESA defines "species" to include "any distinct population segment of any species [DPS] of vertebrate fish . . . which interbreeds when mature." 15 U.S.C. § 1532(16). Classifying "species" and DPSs for listing, conservation, or delisting can be especially difficult where a genetically similar population has different life forms and life histories, such as *O. mykiss*.

All *O. mykiss* spawn and are reared in freshwater. For reasons that are not well understood, some *O. mykiss* (steelhead) smolt and migrate thousands of miles out to sea before returning years later for spawning. The remaining *O. mykiss* (rainbow trout) stay in freshwater

their entire lives. Both *O. mykiss* life forms can breed with and yield offspring that become the other life form, though the repopulation of an anadromous population by a resident population is rarer than the reverse. This complex life cycle is considered to be an "evolutionary bet-hedging strategy": a rainbow trout population that is wiped out by drought or disease one year could be repopulated by returning steelhead the next.

Construction of dams and water diversion projects beginning in the late 19th century, along with other factors, have led to severe declines of steelhead and other Pacific Coast salmonids and their natural upstream habitats. Artificial hatcheries have been used to try to lessen these impacts, but by 1991 NMFS began considering listing *O. mykiss* and other salmonids under the ESA.

NMFS has primary responsibility over species that spend a major portion of their lifetimes in marine waters, while FWS is responsible for those that live primarily in fresh water or on land. NMFS initially considered both anadromous and resident salmonids for listing, but ultimately limited its analysis to anadromous populations. NMFS interpreted "distinct population segment" for Pacific salmonids to mean a genetically "evolutionarily significant unit" (ESU) of a species. NMFS considered that hatchery stocks had the potential to harbor "genetic resources important to the species' evolutionary legacy," and thus to be part of the same ESU as naturally-spawning stocks. In cases where the hatchery component had different genetic lineages than natural stocks, however, NMFS would list only the latter.

In *Alesea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001), the U.S. District Court invalidated NMFS's ESU-based listings for coho salmon, holding that NMFS had improperly made listing distinctions below a DPS when it listed the naturally-spawned component of an ESU while excluding the hatchery component of the same ESU. In a 2002 case before Judge Wanger, *Modesto Irrigation District v. Evans (MID I)*, NMFS conceded that it had followed the same improper policy when it listed ten of fifteen ESUs of Pacific Coast *O. mykiss*. NMFS thus proceeded to revise its salmonid listing policy.

In the rulemaking that followed, NMFS decided to replace the ESU policy with a policy previously developed with, and used by, FWS for identifying DPSs directly. 61 Fed. Reg. 4722 (Feb. 7, 1996). The Joint DPS Policy allows consideration of a broader range of behavioral, morphological, and ecological factors to classify DPSs than the genetics-based ESU policy. NMFS also developed a new Hatchery Listing Policy (HLP) favoring the conservation of naturally-spawning salmonids. 70 Fed. Reg. 37,204 (June 28, 2005). In the HLP, NMFS concluded that the best available science showed hatchery stocks as having potentially negative effects on some natural populations and required the Services to analyze the hatchery stocks separately in listing DPSs. *Id.* at 37,215.

The net result of this rulemaking for *O. mykiss* was NMFS's decision to list four steelhead DPSs (South-Central California, Central California Coast, California Central Valley, and Northern California) as threatened and one steelhead DPS (Southern California) as endangered. 71 Fed. Reg. 834 (Jan. 5, 2006). FWS retains jurisdiction over rainbow trout. For the four threatened steelhead DPSs, NMFS extended take protections, under ESA Section 4(d), to natural-born fish as well as hatchery fish "deem[ed] necessary for the conservation of [the] species" and marked by an unclipped adipose fin. Three of the listed steelhead DPSs include hatchery fish. In listing these three DPSs, NMFS assessed the health of the naturally-spawned component of each DPS and then evaluated the risks to that component posed by the DPS's hatchery stocks. NMFS determined that the hatchery stocks "increased abundance, but have a neutral or uncertain effect on the productivity, spatial structure, and diversity" of the DPSs, which, when combined with other regional efforts to protect the species, warranted their "threatened" listing.

The *Grange & MID II* plaintiffs, a coalition of forestry interests and irrigation districts represented by the Pacific Legal Foundation, brought suit to challenge the *O. mykiss* listings and the underlying Joint DPS Policy and HLP. The plaintiffs did not dispute the underlying science NMFS relied on regarding the impacts of hatchery fish on natural populations. Their primary argument was that, like in *Alesea* and *MIDI*, NMFS

violated the ESA by impermissibly drawing distinctions during the listing process between hatchery and naturally-spawning stocks within the same DPS. Judge Wanger disagreed, reasoning that, while listing the natural but not the hatchery component of the *same* DPS was prohibited, the ESA permitted considering natural and hatchery stocks separately in determining *whether* to list that DPS—so long as the eventual listing determination applied to the entire DPS. Judge Wanger explained that the focus on naturally-spawning stocks in the HLP supported the overriding conservation goal of the ESA, embodied in Section 2(b), of facilitating the recovery of listed species to the point where ESA protections are no longer necessary. Having upheld this separate treatment, Judge Wanger also upheld the Section 4(d) take regulations for the "threatened" DPSs, which allows "surplus" *O. mykiss* marked by a clipped adipose fin to be harvested.

The *Grange & MID II* plaintiffs also challenged the classification of anadromous and resident *O. mykiss* into different DPSs, subject to different administrative jurisdictions, under the Joint DPS Policy. Judge Wanger saw the question of the nature and degree of difference between anadromous and resident *O. mykiss* as involving "complex issues of fact and a high level of technical expertise" so that he had to defer to NMFS unless the agency's decision was "so implausible that it could not be ascribed to a difference in view or to the product of agency expertise." He was satisfied that NMFS had adequate scientific support for its view that rainbow trout and steelhead may be grouped separately: "The very fact that these two populations end up in different environments for portions of their lives supports dividing them into separate DPSs." He also deferred to NMFS's interpretation of the phrase "which interbreeds when mature" in the ESA definition of "species" as being a "necessary but not exclusive condition" for defining a DPS, thus allowing NMFS to designate separate DPSs even where populations may interbreed.

Judge Wanger's opinion in *Grange & MID II* provides constraints as well as opportunities as NMFS readies its revised salmonid biological opinion and as stakeholders reconsider how to use the Delta's resources sustainably. NMFS's policy of favoring

naturally-spawned fish makes it unlikely that hatcheries will play a significant part in any RPA or new recovery plan it develops. NMFS is likely to echo FWS's call for decreased water diversions during spawning and migration seasons and to support longer-term efforts to develop the Bay Delta Conservation Plan to provide a more comprehensive set of conservation tools for the Delta in conjunction with a Section 10 incidental take permit. NMFS may, however, continue to allow take of some "surplus" hatchery fish to satisfy federal trust and tribal treaty obligations, as well as the interests of sportfishers and the public, in abundant, if not self-sustaining, steelhead stocks. Until the Delta is managed in a way that can result in improvements in its native fish populations, NMFS and a host of other federal and state agencies will continue to work to meet society's resource demands and the conservation needs of the Delta's biotic resources.

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COOPERATIVE CONSERVATION ON INTERMINGLED FEDERAL AND NON-FEDERAL LANDS

Julie Thompson

In September 2008, the Fish and Wildlife Service (FWS) published guidance, entitled "Using Existing Tools to Expand Cooperative Conservation for Candidate Species Across Federal and Non-Federal Land." Conservation on intermingled land is complicated by the need to coordinate federal government and voluntary landowner actions. Intermingled property includes land that supports private activities such as ranching where the land is both federal and non-federal, and mixed-use land that may support more than one activity, such as a non-federal surface estate that supports ranching and a federal subsurface estate that includes mineral rights. The goal of the new guidance, which is consistent with the purposes of the Endangered Species Act (ESA), is to utilize existing conservation efforts so that the listing of a species is unnecessary or, if listing does occur, to provide greater predictability for landowners on intermingled lands.

This guidance appears to have remained non-controversial due to its reliance on earlier guidance regarding Candidate Conservation Agreements (CCAs) and Candidate Conservation Agreements with Assurances (CCAAs), which in turn were designed to conserve unlisted species in order to make listing unnecessary and which build on provisions in Sections 7 and 10 of the ESA. Section 7 gives the Secretary of the Interior the authority to consult and plan with federal agencies regarding conservation efforts on federal lands. Such efforts can take the form of a CCA. The assurances under a CCA are provided only to federal agencies acting on federal land. Section 10 of the ESA gives the Secretary the authority to work with private landowners and utilize voluntary conservation measures. Such plans take the form of a CCAA. These plans allow a landowner to commit to specific conservation measures, and in return receive a permit from the Secretary that provides assurances that additional conservation measures and more strenuous restrictions will not be required of them, if listing occurs



LIKE TO WRITE?

The Endangered Species Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor Paul S. Weiland at (949) 833-7800 or PWeiland@nossaman.com.

in the future. The assurances available under a CCAA are provided only to non-federal property owners for their actions on non-federal lands. Thus, the CCAs and CCAAs provide a measure of certainty to the federal and non-federal landowners if and when listing of a species does occur.

To provide this same level of certainty to intermingled landowners, the guidance suggests creating a CCA, or a similar document, which has a subset of information that would cover the requirements of a CCAA. The CCA would provide information obtained from a cooperative effort, including states, tribes, and landowners. The interested parties could provide valuable information on the species, including a description of the species and the land that it occupies, a description of existing and future conservation efforts, a description of the anticipated effects, both adverse and beneficial, and a monitoring plan for the species.

Because the CCA will include a subset CCAA for non-federal property owners, the Secretary will be able to offer a permit for assurances that no additional resource use restrictions or conservation measures on non-federal lands will be required by the Service beyond those in the CCAA (see 50 C.F.R. § 17.22(d)(5) for the specific text of assurances). Additionally, planned actions of non-federal landowners that are authorized or funded by a federal agency are subject to the conference requirement of Section 7(a)(4) of the ESA when listed species are involved. The conference process assists the federal agency and landowners to identify and resolve potential ESA conflicts at an early stage in the planning process. The federal agency may also engage in a conference process with the FWS to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize candidate and other at-risk species. A Conference would result in a Conference Opinion by the FWS. This collaborative process between all interested parties, which results in a detailed CCA, creates a greater degree of certainty for intermingled landowners when dealing with anticipated ESA regulations if listing occurs.

Because this guidance suggests only a collaborative use of existing conservation tools, it has created little

controversy in the legal community. With this approach, and the creation of a comprehensive CCA, the listing of a species may prove to be unnecessary or, if listing does occur, greater predictability will be provided to landowners on intermingled lands.

Julie Thompson established *The Thompson Law Firm in Chicago, Illinois*. She focuses her practice on small business development, including trademark and copyright law and related litigation.

**AMERICAN BAR ASSOCIATION
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Calendar of Section Events

**Key Environmental Issues in U.S. EPA
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Developments**

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**State and EPA Perspectives on
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ABA Annual Meeting

July 30-Aug. 4, 2009
Chicago

17th Section Fall Meeting

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28th Annual Water Law Conference

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